In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 481

RAYMOND W. CLAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 834-837) is reported in 198 F. 2d 792.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1952. (R. 838.) A petition for rehearing was denied November 5, 1952. (R. 839.) The petition for a writ of certiorari was

filed on December 4, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rule 37(b)(2), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the verdict.

2. Whether the trial court erred in refusing to order a bill of particulars.

3. Whether the trial court correctly instructed the jury.

4. Whether there was error in the admission of the contents of county medical records.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

Sec. 145 (as amended by Section 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126). PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided

by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1926 ed., Sec. 145.)

STATEMENT

Petitioner was charged in an information filed March 14, 1950, with wilfully failing to file any individual income tax return for the year 1946. (R. 2.) He was tried by a jury which returned a verdict of guilty. (R. 31.) After denying petitioner's motion for a new trial (R. 36), the trial court sentenced petitioner to serve one year's imprisonment. (R. 37-38.) The judgment was affirmed by the Court of Appeals for the Ninth Circuit (R. 838) and a rehearing was denied. (R. 839.)

The Government's evidence may be summarized as follows: In November 1943 petitioner purchased a restaurant (R. 276-278) for the sum of $11,000 (R. 281, 638-639), making a down payment of $5,300 which he claimed he received from his wife but which was in fact his own money (R. 639, 640). The balance of $5,700 was to be paid in monthly installments. (R. 41, 44, 639.) Petitioner concealed his ownership of the restraurant and its liquor license by putting them in the name of Waldemar Johanson, his stepfather (R. 534, 607) and his reason for doing so was that he had been convicted of a felony (R. 637-638).

In February 1944, petitioner organized a cor-

poration under the name of "Clawson Enterprises, Inc.". The first and only directors and officers were: petitioner, president and director; Kathleen Clawson, his wife, vice-president and director; Charles E. Hicks, secretary and treasurer; Waldemar Johanson, director. (R. 835.) Although one share of stock each was issued to and in the name of petitioner, Waldemar Johanson and Kathleen Clawson, delivery was never made and the stock remained in the stock book. (R. 835.) Some 117 shares were put in the name of Hicks, who was represented to the Commissioner of Corporations for California as the owner of the restaurant equipment which was being transferred to the corporation in exchange for the 117 shares of stock. (R. 835.) Hicks, however, merely held the stock as nominee for petitioner who actually owned the restaurant equipment. (R. 219-220, 331-332, 641, 707, 835.) In March 1946 all of the assets of the corporation were sold for $40,000 cash, the corporation ceased to do business, and no further directors' meetings were held. (R. 150, 401, 835.) Petitioner then used some of the cash for his personal expenses, drawing checks upon the corporation's bank account to pay his rent, life insurance premiums, clothing and hotel bills and other personal expenses, and between May and December 1946 he spent a total of $11,212.05 for such purposes. (R. 625-636, 699, 700, 835.) A further part of the $40,000 received on the sale of the assets of the corporation was spent for the purchase of a yacht in March 1946 for $9,500 (R. 697, 835),

for $8,782.60 worth of improvements on this yacht (R. 60-75, 835), and for a payment of $12,000 to petitioner's ex-wife to purchase a home and furniture (R. 481, 555-556, 580, 835). The yacht which petitioner had purchased in his wife's name (R. 27) was sold by petitioner in September 1946 for $57,750, and he had the checks made payable to himself, explaining to the purchaser that the yacht was in his wife's name only for business reasons. (R. 26, 27, 30, 31, 334, 836.) Petitioner used part of the $57,750 for the purchase of another yacht for $16,750 in November, 1946 (R. 597), and to pay off $27,000 in personal indebtedness (R. 82, 102, 107-120, 574, 699, 836). Thus in 1946 petitioner received $24,416.66 in constructive dividends from the proceeds of the sale of the assets of the corporation (R. 388-399), and a long-term capital gain of $20,377.35 from the sale of the first yacht. On a community property basis, petitioner had gross income in at least the amount of $22,397.01 for the year 1946 (R. 390, 418). He admitted that he was aware of the requirement that he file an income tax return. (R. 622, 691.) He did not, however, file a return for the year 1946 although his gross income was vastly in excess of the minimum $500. (R. 620-622, 691.)

ARGUMENT

1. In order to sustain a conviction for wilful failure to make a return, it is necessary for the Government to establish (1) that the petitioner was a person required by law to make a return for the

taxable period; (2) that he failed to file a return at the time required by law; and (3) that the failure to file was wilful. *United States* v. *McCormick*, 67 F. 2d 867, 868 (C.A. 2d), certiorari denied, 291 U.S. 662. Every individual having for the taxable year 1946 a gross income of $500 or more was required to make a return on or before March 15, 1947. Section 51(a), Internal Revenue Code, as amended by Section 11(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; and Section 53(a)(1), Internal Revenue Code. The evidence summarized above establishes that there was obviously ample support for the verdict. Petitioner seems to be arguing that defense evidence must be accepted to the effect that the monies he received were returns of capital, repayment of loans, funds borrowed by him, or funds belonging to the corporation or others. The jury, however, rejected his version of the facts. Whether petitioner be considered the *alter ego* of the corportion or the recipient of constructive dividends as a stockholder, he clearly received income, individually, in amounts which required him to file an income tax return for the calendar year 1946. *Currier* v. *United States*, 166 F. 2d 346, 348 (C.A. 1st). And the trial court properly instructed the jury on both of the possible interpretations of petitioner's relationship to his corporation as developed in the evidence. (R. 820, 823-824.)

2. The Court of Appeals decided, without discussion, that there was no merit in the other alleged errors claimed by petitioner. (R. 837.) We agree.

Petitioner contends that the trial court erred in denying his motion for a bill of particulars. He argues that as a result he was unprepared to meet the alleged shift in the Government's theory of prosecution from the *alter ego* theory to the constructive dividend theory. But there was no shift in the theory of the case. Rather, as already noted, the evidence is susceptible of two possible interpretations of petitioner's true relationship to his corporation. On either, as the court below stated, "the corporation, created by [petitioner] was a mere dummy. The fact, and not the form, is decisive. [Petitioner] himself was the real owner of all of its capital stock. He himself controlled the corporation. He commanded the income." (R. 837.) The trial court obviously did not abuse its discretion in denying a bill of particulars.

3. It was clearly proper, by way of rebuttal of the claimed receipt by the petitioner's corporation of large sums of money from his grandmother (R. 528-529), to introduce county medical records showing that the grandmother was a charity patient of a county hospital during the period involved (R. 647-665). Petitioner fails to explain how the testimony of the county medical director and the county medical records (being records kept in the regular course of business) were immaterial or irrelevant for the purpose for which they were adduced.

4. Nor was it error, as petitioner claims, to deny him a continuance at the close of the evidence to enable him to make a highly speculative investiga-

tion for cumulative evidence in a further attempt to explain away the effect of the county medical records relating to his grandmother. (R. 785-786.) There was no indication of what evidence might have been secured. This was peculiarly the type of question as to which the trial judge was entitled to exercise a sound discretion.

5. Petitioner complains of the Government's requested instructions which he designates as numbers 2, 9 and 10. Number 2, which proposed that the jury be instructed that any income found to be received was taxable whether lawfully or unlawfully received (R. 29), does not appear in the charge, and the record shows it to have been refused (R. 16). Number 9 was given in substance. (R. 817-818.) It relates to the necessity for keeping sufficient records for income tax return purposes as prescribed by Treasury Regulations, and was clearly accurate and pertinent to the issue of intent. Number 10 referred to the term "wilful" in the evasion statute, Section 145(b), Internal Revenue Code, and, in its context in the charge (R. 816), was plainly used illustratively and could not have been the basis for confusion. The defendant's instructions numbered 3, 9, 12, 13, 18, 28 and 29 were either inappropriate or were given in substance in the charge.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or any question of general importance warranting further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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